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Supreme Court, U.S.
FILED
NOV 29 2000
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No. 00-692

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

C.A. TERHUNE, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I.

THE CHALLENGED INSTRUCTION IN THE PRESENT CASE DID NOT SHIFT THE BURDEN OF PROOF AT THE GUILT PHASE OF THE TRIAL

At page four of his Brief in Opposition, Respondent parrots the faulty reasoning of the Ninth Circuit's *Patterson* opinion by arguing that the jury was effectively "told to presume that the defendant was 'a person of sound mind and discretion'" when the trial court gave the jury the instruction that the defendant was presumed to be sane at the guilt phase of the trial. (Brief in Opposition at 4.) Although Respondent correctly sets forth the holding of the Ninth Circuit ("that the instruction on presumption of sanity amounted to an instruction that the defendant was a person of sound mind, and that this instruction shifted the burden of proof at the guilt phase of the trial" (Brief in Opposition at 2)), the reasoning of the Ninth Circuit's *Patterson* opinion is fatally flawed.

As previously discussed in the Petition for Writ of Certiorari, the Ninth Circuit ignored the undisputed findings by the state appellate court that the trial court correctly had advised the jurors prior to the guilt phase "that the case would be tried in two parts, a guilt phase and a sanity phase," and that "trial counsel did not take issue with the challenged instruction." Despite the presumption of correctness under federal law which should be accorded to the state court findings; despite appellate counsel's concession that the trial court correctly advised the jury about the bifurcated nature of the trial; despite the fact that appellate counsel has never claimed ineffective assistance of trial counsel due to trial counsel's

failure to object; despite the fact that the jury never requested reinstruction concerning either the challenged instruction or the instruction on the use of evidence of mental disease or mental disorder to determine Respondent's specific intent; and despite the fact that the very quotation obtained without notice to the parties indicates that the jurors previously had been given additional information concerning the bifurcated proceedings, the Ninth Circuit proceeded to concoct a speculative rationale based upon the theory that the jury could have been confused by the challenged instruction's failure to define sanity and therefore might have relied upon a lay definition of insanity which could have shifted the burden of proof to Respondent. However, Appendix J conclusively establishes the jury's true understanding of the bifurcated proceedings and undermines the Ninth Circuit's speculative argument that the jury might have relied upon an everyday definition of the word sane.

In an effort to support their argument that the challenged instruction shifted the burden of proof, Respondent and the Ninth Circuit have chosen to ignore the extensive and detailed language spoken to the jury which fully supports the state court's findings of fact and which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J at 5-6, 11-13, 15-19, 21-22, 33, 39, 41-43, 47, 50-52, 56-59, 61-62, 64, 72-74, 78-79, 82, 88-89, 92-94, 97-101, 105-106, 112, 117, 119, 131-132, 145-146, 149, 156, 159-162, 168, 170-171, 174-176, 183.) In short, the transcript of the voir dire proceedings conclusively demonstrates: 1) that the jurors were warned that "sane" was being used in something other than the conventional lay sense (Appendix J at 11-13, 15-16, 19, 21-22, 33, 42-43, 47, 72-73, 78-79, 82, 88, 92-94, 97-101, 105-106, 112, 119, 131-132, 145-146, 149, 156, 159-162, 170-171, 174-176); 2) that it was explained to the jurors that the presumption of sanity was the analytical basis for the bifurcated trial (Appendix J at 5-6, 11, 16-18, 39, 41-42, 51, 58-59, 79, 89,

175, 183); and 3) that the judge provided the jurors with the *M'Naghten* definition of insanity that the jury was asked to presume (Appendix J at 50-52, 57, 64, 72-73, 88, 93-94, 97-98, 105-106, 119, 149).

II.

THE PARTIES AGREE THAT COMPLETE RECORD AUGMENTATION SHOULD BE ENCOURAGED TO PROMOTE ACCURACY AND UNIFORMITY IN APPELLATE OPINIONS

At page five of his Brief in Opposition, Respondent argues that "complete record augmentation should be encouraged to promote[] accuracy and uniformity in appellate opinions." Petitioner agrees.[1] Unfortunately, the Ninth Circuit failed to seek "complete record augmentation" in the present case. As detailed in the Petition for Writ of Certiorari, the Ninth Circuit augmented the appellate record in the present case with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which indicated that further augmentation would undermine the rationale for reversal.

Respondent also argues that "[n]o petition for rehearing was filed in this case" and that "Petitioner's complaint on this minor matter should have been directed to the Circuit Court." (Brief in Opposition at 5.) Petitioner most certainly would have petitioned for rehearing on the augmentation issue (the second question presented in the Petition for Writ of Certiorari) if the

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1. Petitioner further agrees with Respondent's statement that "Chief Justice Rehnquist has cautioned, both in the *Cupp* opinion and again in the dissent to the *Francis v. Franklin* opinion, that the record of the **entire trial** be examined to determine whether the erroneous instruction infected the entire trial." (Brief in Opposition at 6, emphasis added.) However, Petitioner submits that Respondent is mistaken when he claims that the Ninth Circuit "scrupulously adhered to this admonition." (*Id.*)

Ninth Circuit had not effectively precluded Petitioner from doing so by failing to give the parties notice of the December 22, 1999, selective augmentation and by failing to respond to Petitioner's timely oral and written requests for a record citation until after the time for a petition for rehearing had expired.[2]

Respondent further argues that Petitioner should have offered the transcripts of the jury voir dire (Appendix J) "when the issues were joined in the lower courts, state and federal." (Brief in Opposition at 5.) Respondent is mistaken. First, it should be noted that counsel for Respondent Patterson cited *Francis v. Franklin* for the first time during the course of oral argument in the state appellate court and that the state appellate court proceeded to question counsel for Respondent Patterson about whether the trial court had correctly advised the jurors about the procedure of the trial. In its November 6, 1995, opinion, the state appellate court subsequently found (based upon counsel's concession at oral argument) that "It is undisputed that the trial court correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase, and (2) that defendant was presumed sane in the guilt phase." The court also noted that "trial counsel did not take issue with the challenged instruction."[3] (Appendix G at 10.) Second, it was

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2. With regard to the other two questions presented in the Petition for Writ of Certiorari, it should be noted that the first question would not properly have been raised in a petition for rehearing under the Ninth Circuit guidelines, which provide that petitions for rehearing "which merely reargue the case should not be filed." As to the third question presented in the Petition for Writ of Certiorari, only this Court can resolve the conflict between the majority opinions in *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Francis v. Franklin*, 471 U.S. 307 (1985).

3. In a footnote to its November 6, 1995, opinion, the state appellate court stated:

Respondent's burden as a federal habeas corpus petitioner to challenge the aforementioned state appellate court findings of fact which were entitled to a presumption of correctness under federal law. 28 U.S.C. § 2254(e)(1); *see also Sumner v. Mata*, 449 U.S. 539 (1981) [presumption of correctness equally applicable to state appellate court findings of fact]; *Burks v. Borg*, 27 F.3d 1424, 1427-1428 (9th Cir. 1994) [factual findings entitled to the presumption may be made at any point in the process]. Undoubtedly because he knew that the jurors had been correctly informed in the course of voir dire about the bifurcated nature of the trial, Respondent's appellate counsel never sought to augment the state appellate record or the federal habeas record to include transcripts of the voir dire proceedings.

At page six of his Brief in Opposition, Respondent argues that "[n]o cited decision, and no decision known to Respondent's counsel, permits the correction of constitutional error in jury instructions by reference to jury voir dire." However, Respondent's argument misses the point. Petitioner's position is that there was no constitutional error in the jury instructions in the present case. As discussed in the Petition for Writ of Certiorari, the Ninth Circuit erred by extending *Francis* to the present case where the jury was properly instructed on mens rea issues and where there was no instructional link

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> At oral argument, defendant cited *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344], which concerned jury instructions that effectively relieved the State of its burden of proof on criminal intent. As explained above, the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed "the mental state or specific intent" necessary for murder. We find *Francis* inapposite.

(Appendix G at 9, fn. 2.)

between the instructions concerning specific intent for first degree murder and the alleged *Sandstrom* error. Petitioner submits that once the *Patterson* court decided to augment the appellate record in order to invalidate the state court findings, it should have been obligated in the interest of fairness and justice to consider the preliminary instructions and questioning during voir dire before determining whether the "reasonable juror" referred to in *Sandstrom v. Montana*, 442 U.S. 510 (1979) would have considered the charge to have created an unconstitutional presumption.

Finally, at page eight of his Brief in Opposition, Respondent argues that a review of the jury voir dire transcript (Appendix J) "does not assist Petitioner's argument in this case" because "[t]he transcript does not demonstrate that the legal standard [for insanity] was made clear at any point before the guilt verdict was rendered." (Brief in Opposition at 8, fn. 1.) Respondent is mistaken. To the contrary, the trial court explicitly instructed the jury as follows with the *M'Naghten* definition of insanity that the jury was asked to presume:

> A person is legally insane when by reason of mental disease or mental defect he was incapable of knowing or understanding the nature and quality of his act or incapable of distinguishing right from wrong at the time of the commission of the crime. You may consider evidence of his mental condition before, during or after the time of the commission of the crime as tending to show the defendant's mental condition at the time the crime was committed.
>
> Mental illness and mental abnormality in whatever form either may appear are not necessarily the same as legal insanity. A person may be mentally ill or mentally abnormal and yet

> not be legally insane. The defendant has the burden of proving his legal insanity at the time of the commission of the crime by a preponderance of the evidence. That's essentially the instruction.

(Appendix J at 51; also see Appendix J at 50-52, 57, 64, 72-73, 88, 93-94, 97-98, 105-106, 119, 149 where the distinction between mental illness and legal insanity is further elaborated and prospective jurors acknowledge that they understand the difference between being mentally ill and legally insane and that they can follow the law as it applies to the legal definition of insanity, the *M'Naghten* rule.)

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: November 28, 2000.

Respectfully submitted,

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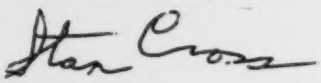

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